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No. 79-

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

RONCI MANUFACTURING CO., INC.,
Petitioner

v.

STATE OF RHODE ISLAND *ET AL.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

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No. 79-

RONCI MANUFACTURING CO., INC.,
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v.

STATE OF RHODE ISLAND *ET AL.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

This case arises out of the State of Rhode Island's attempt to take petitioner's property in an eminent domain proceeding without paying just compensation for what it is taking. The opinion and judgment of the Supreme Court of Rhode Island sharply departed from established principles of law as to what compensation the Federal Constitution requires. Accordingly, petitioner seeks this Court's review by certiorari.

OPINIONS BELOW

The Supreme Court of Rhode Island's opinion (see Appendix A hereto, beginning at p. A1), issued July 19, 1979, is reported at 403 A.2d 1094. The Superior Court's decision (see Appendix C, beginning at p. A11), issued November 26, 1971 after the trial, is unreported.

JURISDICTION

The Supreme Court of Rhode Island issued its opinion and judgment (see Appendix A hereto, beginning at p. A1) on July 19, 1979. On July 23, 1979, petitioner filed a timely petition for reargument, which was denied by order dated October 12, 1979 (see Appendix B, p. A10). The petition for certiorari is being filed within the prescribed 90-day period. This Court has jurisdiction under 28 U.S.C. §§ 1257(3) and 2101(c).

QUESTION PRESENTED

Rhode Island condemned for freeway purposes a portion of a single tract of petitioner's land, leaving petitioner with the portion containing a long-established water system consisting of two dams and related appurtenances. Petitioner's continued operation of the dams after the condemnation would cause substantial backflow of water over the condemned portion. With respect to the condemnation's effects on the water system, Rhode Island's highest court held that no compensation should be paid. The court ruled that under Rhode Island's Mill Dam Act petitioner had a legal right to continue to operate the dams, and accordingly petitioner's rights in the water system were not "taken" even though petitioner would then, as a result of the condemnation, be subject to statutorily-imposed tort liability for flooding the condemned portion. The question presented is:

Whether, in this case involving a partial taking, constitutional just compensation is owing, by way of severance damages or otherwise, because of the State's imposition of potential tort liability upon the owner of land as a result of the condemnation — a potential liability to which the owner would not have been subject before the

condemnation; or whether, instead, the State by its taking is free to inflict such new liability on the owner without compensating him.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions and statutes are set forth in Appendix E, beginning at p. A56.

STATEMENT

To construct twin high-level bridges that would carry east and west bound traffic on Route I-295 across the Blackstone River, the State of Rhode Island in 1963 condemned two parcels of land owned by petitioner. The controversy in this case centers on one of these parcels, which was part of a larger single tract of petitioner's land in Lincoln, Rhode Island. This larger single tract contained a long-operated water system consisting of the two Ashton dams of the Blackstone River, with backed-up river waters behind the dams, together with the Blackstone canal leading to two large ponds (the Scotts pond and Cranberry pond). Only part of this larger single tract was condemned by the State. The condemned parcel (designated "parcel 4") consists of 0.21 acres of land that are subject to submersion by backed-up waters behind the two Ashton dams.[1] Petitioner's integrated water system had a substantial flow of water — 32 million gallons of water per day — which was a yield that could be counted upon at all times including periods of drought (p. A18). The operation of the two dams cannot be varied so as to avoid a blackflow of water over the condemned parcel.

[1]The State of Rhode Island also condemned another parcel of petitioner's land (condemned "parcel 6"), but no dispute exists about the proper measure of damages stemming from condemnation of that parcel.

On petitioner's suit for assessment of damages the Superior Court held that the State condemnation had not extinguished petitioner's right to operate the two dams so as to flow water over the condemned "parcel 4" (pp. A50, A51). Only $4,400 in direct damages were awarded to petitioner (pp. A54, A55). Alternatively, the Superior Court stated that, even if petitioner's water rights had been "taken" by the State, petitioner's integrated water system utilized low quality water and was of no value either at the time of the 1963 condemnation or in the foreseeable future (p. A54). The court therefore concluded that, even if petitioner's flowage rights over the condemned "parcel 4" had been extinguished by eminent domain, petitioner would be entitled only to an additional $31,178 as compensation for the cost of removing the dams, silt, and debris, instead of the more than $400,000 sought by petitioner (p. A54).

The very limited judgment for only $4,400 in direct damages was affirmed on appeal. Treating the crucial issue as one of identifying "what was taken," the Supreme Court of Rhode Island held that "when the state condemned parcel 4, it took the flowage rights appurtenant to said land" (p. A6). "The dispositive issue, therefore, is whether having taken these rights, the state nevertheless took parcel 4 subject to Ronci's right to continue operating the Ashton dams, thereby back-flowing water over the condemned property" (p. A6).[2]

The state Supreme Court ruled that the 1963 declaration of taking unambiguously stated that parcel 4 "together with all rights appurtenant to said land" was taken by the State for highway and freeway purposes (p. A5). Thus a

[2]The state Supreme Court noted that "According to uncontradicted expert testimony, the only way to eliminate the alleged trespass [of backwaters onto the condemned "parcel 4"], if indeed such a trespass was caused by the condemnation proceedings, was by breaching and removing the Ashton dams" (p. A2).

1970 State "Declaration of Clarification re Intention of Taking," containing a contrary indication, was inadmissible under state law (pp. A6-A7). The Supreme Court ruled, however, that the 1963 declaration of taking must be read in conjunction with the Rhode Island Mill Dam Act (R.I. General Laws §§ 46-18-1 *et seq.;* p.A57): "Under the statutory scheme the owner of a mill dam is permitted to flow water upon the land of another *but must respond in damages* for any resultant injury. When the state took parcel 4 by eminent domain, it was bound by the unequivocal mandate of §§ 46-18-1, -2, which authorized Ronci, *subject to a possible statutory action for damages,* to back-flow the waters of the Blackstone river when it operated the Ashton dams" (p. A8, emphasis added). The court then affirmed the trial court's award of damages limited to the $4,400 for a direct taking of parcel 4. "Ronci's right to operate the Ashton dams was unaffected by the taking in this case, and therefore the state did not interfere with its integrated water system" (p. A8).

Presentation and Decision of the Federal Question. Petitioner filed this case in the Superior Court by petitioning for an assessment of damages, pursuant to Rhode Island General Laws, Section 37-6-18 (p. A11), seeking just compensation as provided by law for the eminent domain taking by the State.[3] The basic issue throughout the

[3]Though no copy of the petition filed in the Superior Court for assessment of damages has currently been located, it is the recollection of Leo M. Goldberg, Esq., who has been counsel to petitioner throughout the State courts, that the petition, in seeking the just compensation to which petitioner was entitled, expressly referred to what petitioner was entitled to under the Rhode Island statutes and under the Rhode Island and United States Constitutions. (The circumstances relating to present nonavailability of the document, Mr. Goldberg states, are that in the many intervening years his own files have become disrupted, as have those of counsel for the respondent from whom he has sought to obtain a copy; and the official court file of the Superior Court, having moved from the Superior Court to the

case has been what petitioner is entitled to recover as just compensation because of the condemnation by the State of Rhode Island. This issue necessarily involves the minimum constitutional requirements imposed by the Fifth and Fourteenth Amendments to the Constitution of the United States, it having been established by this Court at least since 1897 that the takings clause protection in the Fifth Amendment is applicable to the States and it having been accepted by prior Rhode Island decisions that this is so (see note 4 at p. 7 below). The memorandum filed by petitioner in the Superior Court at the conclusion of the trial (see pp. 66-67 and 84-88 thereof) relied on a number of decisions of this Court in support of petitioner's claim for just compensation, including, among others, the decisions in *United States* v. *Causby,* 328 U.S. 256 (1946) and *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962) which we discuss below in note 7. A large portion of the Superior Court's extensive decision (pp. A11-A54) is devoted to the question of what would be "just compensation" to petitioner, and the decision, among other things, refers (p. A52), though somewhat inadequately, to *Dugan* v. *Rank,* 372 U.S. 609 (1963), which, as we shall show on p. 11 below, is in direct conflict with what the Supreme Court of Rhode Island has here decided.

In its brief in the Supreme Court of Rhode Island (see particularly pp. 76-93 thereof) petitioner extensively argued the substance of the federal question as to the severance and consequential damages petitioner is entitled to recover by virtue of the taking. In at least five places in the brief (see pp. 65, 78, 82, 87, 93 thereof) petitioner ex-

Supreme Court and then apparently back to the Superior Court, likewise has not been located although a search has been made.) In any event, as noted in this section, the other circumstances make it sufficiently clear that the federal question was both properly presented and expressly decided.

pressly referred to its claim that petitioner had been denied the damages "mandated by Sec. 16, Article I of the Rhode Island Constitution and Article V of the Amendments to the United States constitution as embraced within the Fourteenth Amendment to the United States Constitution" (p. 78 thereof), or used substantially equivalent language expressly referring to the just compensation as mandated by takings clause requirements of the United States Constitution (pp. 65, 82, 87, 93 thereof). Moreover, federal decisions, including decisions of this Court, were cited and extensively relied on by petitioner's brief in the Supreme Court of Rhode Island in support of petitioner's contentions on the federal question (see pp. 21-23, 32-33, 65-67, 74-75 thereof). The Supreme Court of Rhode Island in its opinion expressly rejected the substance of the federal question which petitioner had been urging, even though the opinion did not explicitly mention the Federal Constitution. Furthermore, the federal question was thereafter urged once again – and in light of the specific ruling by the Supreme Court of Rhode Island – in the memorandum which petitioner filed in that court in support of its petition for reargument and in petitioner's two additional memoranda filed in that court in support thereof.

REASONS FOR GRANTING CERTIORARI

The Supreme Court of Rhode Island's opinion and judgment sharply depart from well settled rules of constitutional just compensation.[4] Where only part of a tract

[4]For over eighty years it has been fully recognized that the takings clause protection in the Fifth Amendment is applicable to the States through the Fourteenth Amendment. *Chicago B. & Q. R.R.* v. *City of Chicago,* 166 U.S. 226, 238-241 (1897); *Penn Central Transp. Co.* v. *New York City,* 438 U.S. 104, 122 (1978). Prior Rhode Island decisions accept this principle. See, e.g., *In re Pawtucket & C.F. Grade Crossing Commission,* 36 R.I. 200, 214-219, 89 A. 695, 700-702

of land is taken in eminent domain, the owner is not confined to recover for only the part taken, but is constitutionally entitled to recover also for "severance damages" visited upon the remaining part. See, *e.g.*, *United States* v. *Dickinson*, 331 U.S. 745, 750-751 (1947); *United States* v. *Miller*, 317 U.S. 369, 375-376 (1943); *United States* v. *Grizzard*, 219 U.S. 180 (1910); *United States* v. *Welch*, 217 U.S. 333 (1910); *Bauman* v. *Ross*, 167 U.S. 548, 574-575 (1897).[5] This very basic principle was violated by the deci-

(1914); *Horton* v. *Old Colony Bill Posting Co.*, 36 R.I. 507, 550-553, 90 A. 822, 837-838 (1914); *State Airport Commission* v. *May*, 51 R.I. 110, 152 A. 225 (1930); *City of Newport* v. *Newport Water Corporation*, 57 R.I. 269, 277, 189 A. 843, 847 (1937); *Assembly of God Church of Pawtucket, R.I.* v. *Vallone*, 89 R.I. 1, 9, 150 A.2d 11, 15 (1959); *Alper & Son, Inc.* v. *Director of Public Works*, 98 R.I. 154, 156-158, 200 A.2d 583, 586-587 (1964); *J.M. Mills, Inc.* v. *Murphy*, 116 R.I. 54, 69-73, 352 A.2d 661, 669-671 (1976); *State* v. *Capuano Bros.*, ___ R.I. ___, ___, 384 A.2d 610, 614-615 (1978). Indeed, the Rhode Island Constitution, Article I, §16, contains the parallel provision that "Private property shall not be taken for public uses, without just compensation", and the Rhode Island decisions (such as many of the foregoing) accordingly tend to merge discussion of the two and treat them as interwoven.

[5]Thus in *United States* v. *Dickinson*, 331 U.S. at 750, the Court stated:

> "If the Government cannot take the acreage it wants without also washing away more, that more becomes part of the taking. This falls under a principle that in other aspects has frequently been recognized by this Court. It was thus put in *Bauman* v. *Ross*, 167 U.S. 548, 574: 'when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account.' "

And, as the Court stated in *United States* v. *Grizzard*, 219 U.S. at 185:

> "That the trial judge found the damages for the land and for the easement of access separately is not controlling. The determining factor was that the value of that part of the Grizzard farm not taken was $1,500, when the value of the entire place before the taking was $3,000. A judgment for a less sum will not be that 'just compensation' to which the defendants are entitled. The case is not different in legal consequence from what it would have been if a railway had been constructed across one's lawn, cutting the owner off from his road and outbuildings, etc. To say that such an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice."

sion below, which sanctions a partial taking without any compensation for the State's imposition (by virtue of the condemnation) of tort liability on petitioner's remaining interest. For many years petitioner's Ashton dams had been operable without flowing water on the land of any third parties; suddenly, the condemnation made petitioner subject to tort liability for flowing of water over the condemned portion taken by the State. Rhode Island's taking of the condemned portion in fee for freeway purposes cut off petitioner's right of access to continue to flood that portion without becoming subject to liability.

1. An excessively myopic view of just compensation is reflected in the state Supreme Court's basic reasoning that petitioner's "right to operate the Ashton dams was unaffected by the taking in this case, and therefore the state did not interfere with its integrated water system" (p. A8). The taking in this case imposed an immediate statutory tort liability (with corresponding diminution of market value) on petitioner's remaining interest. This immediate damage to petitioner was neither "speculative" nor "imaginary" nor "remote". Compare *Miller* v. *United States*, 137 F.2d 592, 595 (3d Cir. 1943); Orgell, Eminent Domain §§58-62 (2d ed. 1953). It was specifically "due to the taking" of part of petitioner's land. Compare *Campbell* v. *United States*, 266 U.S. 368 (1924); Orgell §§56, 57.

Without costly removal of the two Ashton dams, the court below recognized (p. A2), petitioner cannot take action to mitigate or eliminate the tort liability inflicted upon it by the State's taking. Compare *United States* v. *91.90 Acres,* 586 F.2d 79, 88 (8th Cir. 1978), cert. denied 441 U.S. 944 (1979).

"Where a partial taking is effected by eminent domain, the general rule is that any element of damage which results in a diminution of value of the remainder area is a factor which must be considered. The different elements of damage to remaining land recoverable when part of a tract is taken are as numerous as the possible forms of injury." 4A Nichols on Eminent Domain, §14.24 (3d ed. 1979); accord: Orgell, Eminent Domain, §§4, 49, 58, 65 (2d ed. 1953); 27 Am. Jur. 2d Eminent Domain § 311; and see the excerpt from this Court's decision in *United States* v. *Dickinson,* quoted in note 5 on p. 8 above. Thus, for example, it has been held in a group of state court decisions, including decisions by the highest courts of at least two States, that a taking which leaves the remaining area in violation of a zoning ordinance gives rise to a compensable damage for that newly-imposed burden. See *Schuh* v. *State,* 251 Ind. 403, 407-408, 341 N.E.2d 362, 364 (1968); *Smith* v. *Zoning Bd. of Appeals,* 174 Conn. 323, 328-329, 387 A.2d 542, 546 (1978); *State Dept. of Highways* v. *Davis,* 596 P.2d 400, 402 (Colo.Ct.App. 1979), cert. granted by Colo. Sup. Ct., June 18, 1979.

It was a grave departure from these fundamental and well-established principles for the state Supreme Court to hold that the taking in this case, which inflicts on petitioner's remaining land the statutorily-imposed tort liability for flooding the condemned portion, does not give rise to compensable "severance damages" to the remaining

area.[6] See also *United States* v. *Virginia Electric & Power Co.,* 365 U.S. 624, 633 note 5 (1961) [the "right to damage" remaining lands, outside scope of direct condemnation of flowage easement, is a "property right" in such remaining lands, which can be contractually transferred, and which is a proper subject of just compensation]. Whatever may sometimes be "the difficulty of trying to draw the line" between what is compensable and what is not, see *Armstrong* v. *United States,* 364 U.S. 40, 48 (1960); *Kaiser Aetna* v. *United States,* No. 78-738, decided December 4, 1979, 48 U.S.L.W. 4045, 4048, this case — like those just cited — is one where compensation clearly is required. The state Supreme Court's reading of the law as to the State's minimum just compensation obligation was plainly wrong.

2. Moreover, the present case is indistinguishable in principle from *Dugan* v. *Rank,* 372 U.S. 609 (1963), where a partial taking of water rights, imposing a servitude on the water rights of the remaining area, gave rise to compensable damages to the remaining area.[7] See 372 U.S. at

[6]Where condemnation of an entire tract subjects the land to new statutory obligations, the owner-condemnee must be compensated for the cost of complying with these newly-imposed statutory obligations. See *United States* v. *79.95 Acres in Rogers County,* 459 F.2d 185, 188-189 (10th Cir. 1972) [where condemnation of land containing working oil wells triggered state statutory obligation to plug wells, Government was liable for plugging costs]. The same principle of compensation should apply in a partial taking case.

[7]The well-settled rule is that the Government's imposition of a servitude on lands which the Government decides to make use of calls for constitutional just compensation. See, e.g., *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 260 U.S. 327 (1922) [firing of projectiles over summer resort can constitute taking]; compare *United States* v. *Causby,* 328 U.S. 256 (1946) ["air rights" taken by low-flying airplanes]; *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962) [same]. The authoritativeness of these decisions was fully recognized by both the majority and the minority opinions in *Penn Central Transp. Co.* v.

625-626. Our petition presents a classic case where a partial taking of land inflicts "damages" (statutorily-imposed tort liability) upon the remaining lands.

3. The underlying purpose of constitutional just compensation is to seek to put the owner of condemned property "in as good a position pecuniarily as if his property had not been taken." *United States* v. *564.54 Acres of Land, Etc.*, 441 U.S. 506, 510 (1979). This basic purpose was clearly frustrated by the decision below.

As the functions of government have grown, so has the necessity for both the Federal Government and the States to resort to eminent domain. Today, in a vast country which is heavily dependent on its roads and superhighways and freeways, eminent domain for this one type of public use alone has become an everyday occurrence. While significant numbers of eminent domain cases are processed through the federal courts, it is to be expected that the bulk of them will be in the State courts. This puts special responsibilities on State courts to abide by the precepts of the Federal Constitution. It underscores the importance of this Court's reviewing such a serious failure on the part of Rhode Island's highest court to meet the minimum standards of just compensation under the Constitution.

CONCLUSION

The Rhode Island Supreme Court's decision cannot be sustained. It works a grave injustice upon petitioner. But it does far more than that. It cannot be squared with the just compensation principles which this Court has announced. It likewise cannot be squared with principles applied by a

New York City, 438 U.S. 104, 128, 143 (1978) – a case which held that no compensable taking of Grand Central Terminal had occurred under the highly unusual circumstances presented by the New York City Landmarks Preservation Law in a situation bearing no resemblance to the present case.

number of other courts. Yet if it is allowed to stand uncorrected by this Court, the decision below will provide improper encouragement not only in Rhode Island but in other States to find ways of evading and of circumventing the constitutional obligation to give just compensation for the taking of private property.

For the reasons we have summarized, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Supreme Court

Ronci Manufacturing Co., Inc. :
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v. : No. 76-106—Appeal.
:
State of Rhode Island et al. :

[July 19, 1979]

OPINION

DORIS, J. This is a petition for assessment of damages resulting from the condemnation by the state of two parcels of land owned by the plaintiff, Ronci Manufacturing Company (Ronci), in the town of Lincoln. The case was tried before a Superior Court justice sitting without a jury pursuant to G.L. 1956 (1977 Reenactment) § 37-6-18. After a 42-day trial, during which 16 witnesses testified and 176 exhibits were introduced, the trial justice awarded Ronci $4,400 in damages, plus interest. Ronci has appealed from that judgment on several grounds.

The essential facts are undisputed. On August 21, 1963, the state took by condemnation two parcels of Ronci's land in Lincoln. The taking was effectuated to enable the construction of twin high-level bridges that would carry the east and west bound traffic of Route I-295 across the Blackstone river. One of the parcels, designated "parcel 4," consisted of .21 acres of land bordering the river. The other parcel, designated "parcel 6," contained 1.85 acres of land not bordering the river. The central issue in this controversy concerns the legal consequences that resulted from the condemnation of parcel 4.

Ronci not only owned the two parcels of land taken by condemnation, but also had title to the Ashton dams,

Blackstone canal, Scotts pond, and Cranberry pond. The Ashton dams, situated on the Blackstone river approximately 1,350 feet south of parcel 4, performed two functions simultaneously. The dams diverted the river waters into the Blackstone canal, which in turn provided the water for the two ponds 3 1/4 miles away. Through its chain of title, Ronci traced the right to operate the dams so as to maintain the level of water in the ponds at 74.5 feet above sea level. Expert testimony established that when Scotts pond and Cranberry pond were maintained at that level, they contained respectively 319 million and 52 million gallons of water.

By operation of the dams, the waters of the Blackstone river were also back-flowed for a distance of 6,200 feet, thereby flowing over the condemned land of parcel 4 at a depth of at least 6.5 feet during normal river flow. At trial, Ronci's principal contention was that the condemnation of parcel 4 had extinguished its legal right to operate and control the Ashton dams. The premise of this argument was that to the extent the dams caused the river waters to backflow over the area of parcel 4, Ronci was a trespasser on the condemned land. According to uncontradicted expert testimony, the only way to eliminate the alleged trespass, if indeed such a trespass was caused by the condemnation proceedings, was by breaching and removing the Ashton dams. Removal of the dams would make future diversion of the river waters into the Blackstone canal impossible.[1] Because the canal was the principal water supply for the two ponds, the removal of the dams would result in the total loss of what Ronci claimed was a valuable, integrated

[1]The bed of the Blackstone river is 67 feet above sea level. The bed of the Blackstone canal is 69 feet above sea level.

water system.[2] Based on this "trespass" theory, Ronci claimed it was entitled to compensation for the fair market value of the two parcels of land *and* for the loss of its integrated water system consisting of the Ashton dams, Blackstone canal, Scotts pond, and Cranberry pond.

Accordingly, Ronci's expert testimony on damages proceeded upon the theory that the state's taking of parcel 4 in fee simple had extinguished its right to operate the Ashton dams, thereby resulting in the complete loss of its integrated water system. Daniel Fanning, a civil engineer, testified that the cost to remove the dams, silt, and debris, and to spread the same in the adjacent Blackstone canal, would be $31,178. He further stated that to dispose of the debris away from the site would cost an additional $5,231.

Paul Carter, a real estate appraiser testifying for Ronci, relied upon comparable sales and the before-and-after method of valuation in placing Ronci's total damages at $441,500. John Rowlson, another real estate appraiser called by Ronci, employed three separate methods of valuation. Utilizing the method of substitution, he appraised Ronci's damages as $423,000. Under the theory of capitalization, he arrived at a figure of $407,000. Using the comparable sales approach, which he stated was the most reliable method, Rowlson set petitioner's damages at $430,909. The integral component in all four of these appraisals was the supposed value of the water system Ronci claimed had been taken.

[2]Ronci's expert witness testified that when operational, the Ashton dams could deliver a safe yield of 33 million gallons of water daily into the Blackstone canal. The canal could deliver daily a safe yield of 32 million gallons of water into the two ponds. Removal of the dams would render the daily safe yield of the canal nearly zero.

The state contended at trial that the taking was subject to Ronci's right to operate the Ashton dams and to backflow the waters of the Blackstone river over the condemned land. The state, over Ronci's objection, placed into evidence a document entitled "Declaration of Clarification re Intention of Taking," executed on September 10, 1970. This document declared that the condemnation of parcel 4 was subject to Ronci's right to operate the dams and backflow the river waters over the land taken by the state. The state also argued that the taking was subject to the so-called Mill Dam Act, G.L. 1956 (1970 Reenactment) §§ 46-18-1 to 16, which it claimed prevented the state from interfering with Ronci's right to operate the Ashton dams.

The state also presented expert testimony on the issue of damages. William J. Coyle, Jr., a real estate appraiser, testified in two phases. First, he assumed that Ronci's right to operate the dams and its right of flowage had not been extinguished. With these assumptions, and utilizing the market data method of valuation, he stated that Ronci had been damaged in the amount of $4,400 by the condemnation. Second, he testified that even if the condemnation had extinguished its right to operate the dams, Ronci was not entitled to any additional compensation because the integrated water system had no value. Mr. Coyle testified that on the date of the condemnation, and in the foreseeable future, there was no demand for water of the type produced by the Blackstone canal complex.

The trial justice, in a well-written comprehensive opinion, held that Ronci's right to flow water over parcel 4 by operating the Ashton dams had not been extinguished by the condemnation. Accepting Mr. Coyle's testimony as the only credible testimony in the case, the trial justice awarded Ronci $4,400 in damages. In the alternative, she stated that even if the water rights had been taken, she accepted

Mr. Coyle's testimony that the integrated water system had no value either at the time of the condemnation or in the foreseeable future. She therefore stated that if Ronci's flowage rights had been extinguished, it would only be entitled to an additional $31,178 as compensation for the cost to remove the dams, silt, and debris.

The central question we must address in this case concerns exactly what was taken by the state in its exercise of the power of eminent domain. The declaration of taking stated that parcels 4 and 6, together with all rights appurtenant to said land, were taken by the state in fee simple for highway and freeway purposes. Ronci argues before us, as it did in the trial court, that because the state took its property in fee simple by condemnation, without any reservations, it acquired all the rights and easements, including the water flowage rights, that existed on the date of condemnation. Ronci further asserts that the trial justice committed a reversible error of law when she ruled that Ronci's right to operate the Ashton dams, and to back-flow the waters of the Blackstone river over the condemned land, were not extinguished by the condemnation.

Statutes providing for an exercise of the power of eminent domain must be strictly construed, both in regard to the amount of property to be taken and the quantum of interest acquired. *See Vallone v. City of Cranston,* 97 R.I. 248, 260, 197 A.2d 310, 317 (1964). The condemnation in this case was pursuant to chapter 10 of title 24 and chapter 6 of title 37 of the General Laws. Section 24-10-3 provides that:

> "Where an existing highway has been designated as or included within a freeway by the said director, existing easements of access, light or air may be extinguished by purchase or by taking under eminent domain."

As the state correctly asserts, § 24-10-3 does not mention water rights. Section 37-6-5, however, provides for a taking in fee simple of "lands and *other* real property and rights, interests, estates, easements and privileges therein, and foreshore, *riparian* and littoral rights." (Emphasis added.) Accordingly, when the state condemned parcel 4, it took the flowage rights appurtenant to said land. The dispositive issue, therefore, is whether having taken these rights, the state nevertheless took parcel 4 subject to Ronci's right to continue operating the Ashton dams, thereby back-flowing water over the condemned property.

We agree with Ronci's contention that the trial justice erred when she admitted and considered the clarification document. This document, executed more than 7 years after the formal declaration of taking was filed, purported to clarify the extent of the condemnation by providing that the state intended Ronci to retain its right to operate the dams. It is well settled, however, that the extent of a taking is determined as of the date of condemnation. *E.g., O'Donnell v. State,* 117 R.I. 660, 665, 370 A.2d 233, 236 (1977); *Narciso v. State,* 114 R.I. 53, 58, 328 A.2d 107, 110 (1974); *Honig v. Director of Public Works,* 106 R.I. 199, 210, 258 A.2d 73, 79 (1969). The good faith of the state and the extent of what it intended to do are not material unless such intention is set forth in binding terms in the condemnation document itself. *Narciso v. State,* 114 R.I. at 58, 328 A.2d at 110; *see Honig v. Director of Public Works,* 106 R.I. at 210, 258 A.2d at 79; *Murphy v. Director of Public Works,* 103 R.I. 451, 456, 238 A.2d 621, 624 (1968); *Sullivan v. Marcello,* 100 R.I. 241, 251, 214 A.2d 181, 186 (1965). The state's intentions, expressed in a document executed over 7 years after the condemnation date, were not material to a determination of the extent of the taking.

The state argues that the case of *United States v. Holmes,* 238 F.2d 229 (4th cir. 1956), sanctions the admission of such a document. We believe, however, that *Holmes* is clearly distinguishable from the instant case. In that case the trial justice, hearing additional testimony after the appellate court had remanded the matter, permitted the declaration of taking to be amended so as to describe more precisely the nature of a flowage easement taken by the Federal Government. *Id.* at 230. The Fourth Circuit Court of Appeals noted that although the amendment was unnecessary, it merely served to make more definite exactly what was being acquired because the original condemnation document had been ambiguous. *Id.* at 230-31. In the instant case, the declaration of taking was unambiguous on its face, and therefore the clarification document should not have been received into evidence.

We hold, however, that this error was harmless because we agree with the conclusion of the trial justice that the provisions of the Mill Dam Act, §§ 46-18-1 to 16, are controlling.

In *Sullivan v. Marcello,* 100 R.I. at 251, 214 A.2d at 186, we stated that:

> "[W]e turn to the condemnation instruments for it is within their four corners, and only there, that we can ascertain what was acquired and *other than as provided by statute* what, if any, limitations or restrictions on the use thereof were assumed." (Emphasis added.)

The Mill Dam Act is the kind of statute referred to in *Sullivan.* Section 46-18-1 states that:

> "Whenever any person, either upon his own land or upon the land of another with his consent, shall have set up any water mill or dam for the purpose of form-

ing a pond to supply water to any mill or mills upon the stream whereon the dam is located, the owner of such mill or dam may continue and improve the pond and keep up the dam thereof on his own land for his advantage without molestations."

The remainder of chapter 18, title 46 of the General Laws provides a remedy for land owners whose property is overflowed by the operation of such a mill dam. *See, e.g.*, § 46-18-2. Under the statutory scheme the owner of a mill dam is permitted to flow water upon the land of another but must respond in damages for any resultant injury. When the state took parcel 4 by eminent domain, it was bound by the unequivocal mandate of §§ 46-18-1, -2, which authorized Ronci, subject to a possible statutory action for damages, to back-flow the waters of the Blackstone river when it operated the Ashton dams. Unquestionably, a mill dam, like any other private property, can be taken by an appropriate exercise of the power of eminent domain. *See, e.g., Hazen v. Essex Co.*, 66 Mass. (12 Cush.) 475, 476 (1853); 3 Farnham, *The Law of Water and Rights* § 714 at 2178 (1904). To do so, however, the condemning authority must typically take the land upon which the dam is situated. This was not done in the instant case. Rather, the state took a small parcel of land some 1,350 feet south of the Ashton dams and an additional 3 1/4 miles from the two ponds. We therefore hold that the trial justice did not err when she held that Ronci was only entitled to be compensated for its loss of parcels 4 and 6. Ronci's right to operate the Ashton dams was unaffected by the taking in this case, and therefore the state did not interfere with its integrated water system.

Ronci further argues that the trial justice erred when she found that Ronci had been damaged only in the amount of $4,400. It contends that this amount is grossly inadequate.

We initially note that the major premise of this argument has already been answered. The expert appraisals, which placed Ronci's damages at over $400,000, primarily included valuations of the integrated water system[3] which we have held was not taken by the state.

Both Ronci and the state presented extensive expert testimony on the question of damages. The trial justice chose to believe the testimony of Mr. Coyle, the state's witness, and found as a fact that Ronci's damages were $4,400. Such a factual finding is accorded great weight and will not be disturbed by this court on appeal unless the trial justice misconceived or overlooked any material evidence or was clearly wrong. *See, e.g., Cunningham v. Marcello,* 106 R.I. 400, 404, 260 A.2d 451, 453 (1970); *McHale v. Director of Public Works,* 100 R.I. 770, 772, 219 A.2d 766, 767 (1966) (per curiam); *Caldarone v. State,* 98 R.I. 7, 13, 199 A.2d 303, 306-07 (1964). Ronci has failed to make such a showing in this case.

Accordingly, the plaintiff's appeal is denied and dismissed, the judgment appealed from is affirmed, and the case is remanded to the Superior Court for further proceedings.

Mr. Justice Weisberger did not participate.

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[3]Mr. Coyle's valuation of the condemned land was actually higher than those of Ronci's expert witnesses. For example, Mr. Coyle valued parcel 6 at $4,100 while Ronci's expert, Paul Carter, valued the same land at $500. The tremendous disparity between the parties' expert appraisals was a direct result of Ronci's inclusion of the integrated water system in its computation of damages.

APPENDIX B

Supreme Court

Ronci Manufacturing Co., Inc.	:	
	:	
v	:	No. 76-106-A
	:	
State of Rhode Island and Director of Public Works	:	

ORDER

The petition to reargue is denied.

Mr. Justice Weisberger did not participate.

Entered as an order of this court this 12th day of October, 1979.

BY ORDER,

/s/ Brian B. Burns for
Walter J. Kane
Clerk

APPENDIX C

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

RONCI MFG. CO., INC.	)	
	)	
vs.	)	M.P. No. 6553
	)	
STATE OF RHODE ISLAND and DIRECTOR OF PUBLIC WORKS OF THE STATE OF RHODE ISLAND	)	

[November 26, 1971]

DECISION

MURRAY, J. This is a petition for assessment of damages brought by the Ronci Mfg. Co., Inc., a Rhode Island corporation, pursuant to the authority granted by the provisions of *Title 37, Chapter 6, Section 18* of the *General Laws of Rhode Island,* 1956, against the Director of Public Works of the State of Rhode Island in his capacity as head of the Acquiring Authority acting for the State of Rhode Island and Providence Plantations.

The Petitioner was the owner in fee simple of land, improvements and appurtenances situated in the Town of Lincoln, County of Providence, State of Rhode Island, identifiable as Parcel 4 on Highway-Freeway Condemnation Plat 1347, containing 0.21 acres of land, and Parcel 6 on said Highway-Freeway Condemnation Plat 1347, containing 1-85/100 acres of land.

On the 21st day of August, A.D. 1963, the above described property was taken by condemnation. It is

agreed that each and all of the steps necessary to properly bring this case before the Superior Court have been taken, and the instant petition for assessment of damages was heard as a jury trial waived case, the parties having been unable to agree as to the price to be paid for the land, improvements, and appurtenances so acquired.

Atlantic Refining Company v. Director of Public Works, 98 R.I. 167 (1964)

A view of the premises was taken by the Court and is of invaluable assistance in understanding the evidence as it has been presented.

Rietzel v. Cary
66 R.I. 418 (1941)

This evidence was elicited by the petitioner from seven (7) witnesses in its direct case including one (1) rebuttal witness. The petitioner introduced 161 exhibits. The State presented nine (9) witnesses and introduced 15 exhibits.

It will be helpful and it is necessary to summarize the testimony since much of the detailed matter, while contained in exhibits, is amplified or expanded by testimony. This summary must of necessity be abbreviated since the testimony itself is technical in nature and tends to be both voluminous and rambling. Therefore, it has seemed wise to provide a quick index, which follows, stating the name of each witness, some identification, and a note as to the exhibits with which that witness identified himself and his testimony. The summary follows this index.

1. Petitioner's Witnesses
2. Respondent's Witnesses
2. Petitioner's Rebuttal Witness

PETITIONER'S WITNESSES

EDWARD L. SINGSEN, ESQ. – ATTORNEY AT LAW
EXHIBITS 1, 2, 4, 6, 19, 20, 21, 22, 23, 24, 25, 26, 27, 34, 35, 36, 37, 38, 39, 40, 41, 61, 121

MR. ELLSWORTH V. STANLEY – CIVIL ENGINEER
EXHIBITS 42A, 42B, 42C, 42D, 42E, 42F, 42G, 121

MR. HOWARD M. TURNER – HYDRAULIC ENGINEER
EXHIBITS 2, 3, 6, 9, 13P (1-21), 26, 27, 39, 42A, 42B, 42C, 42D, 42E, 42F, 42G, 43, 65A, 65B, 121

MR. DANIEL P. FANNING – ENGINEER
EXHIBIT 64

MR. PAUL CARTER – REAL ESTATE APPRAISER
EXHIBITS 66, 68

MR. JOHN F. ROWLSON – APPRAISER
PETITIONER'S EXHIBIT 91, 67, 68
RESPONDENT'S EXHIBIT E and F

PETITIONER'S REBUTTAL WITNESS

ARCHIE SMITH, ESQ.
EXHIBITS 121, 120, 120A, 2, 6, 119A, 117, 118, 152, 112, 113, 114, 115, 154, 155, 156, 157, 158

STATE OF RHODE ISLAND – WITNESSES

LEWIS A. WATERMAN, ESQ. – Attorney at Law

MR. DANIEL O. CARGILL – Chief Engineer, Department of Public Works, Division of Roads and

Bridges in the State of Rhode Island

Petitioner's Exhibits 3, 9, 44, 121

MR. SAMUEL S. ENGDAHL – Supervising Civil Engineer Bridge Design, Division of Roads and Bridges, Department of Public Works

Petitioner's Exhibits 3, 9, 44

MR. HENRY ISE – Chief of Division of Harbors and Rivers

MR. JOSHUA N. CHOPY – Principal Civil Engineer, Bridge Design Section, Department of Public Works

Petitioner's Exhibit 64

MR. HENRY F. MONROE – Registered Professional Engineer in R.I. and Massachusetts, Staff Director of Water Resources Coordinating Board of State of Rhode Island

MR. MORRIS CHORNEY – Executive Director of Transportation and Chief Engineer of the Public Works Division, State of Rhode Island, formerly director of Public Works

Respondent's Exhibits A, AA
Petitioner's Exhibits 2, 6

MR. WILLIAM H. SPAULDING, JR. – Superintendent, Water Department, Town of Lincoln

MR. WILLIAM E. COYLE, JR. – Real Estate Appraiser

Respondent's Exhibits K1 and K2; L and N

MR. MARCEL C. COURNOYER

Respondent's Exhibits C, B, L
Petitioner's Exhibits 142, 143, 144, 149, 149A, 149B

PETITIONER'S WITNESSES

EDWARD L. SINGSEN, ESQ., member of the Rhode Island Bar, testified upon direct and cross-examination as follows:

That he researched the title of Parcels Nos. 4 and 6 on Freeway Plat 1347, and examined the deeds and appurtenant documents entered in the instant case, all of which were recorded both in Lincoln and Cumberland; that he traced title of the subject condemned property from the ownership by the Lonsdale Company to the ownership by Ronci, the petitioner, and also traced title of the Ashton Dam, Blackstone Canal, Scotts Pond, and Cranberry Pond from the ownership by said Lonsdale Company to the ownership by petitioner Ronci, including the right to operate the Ashton Dam so as to keep the level of waters of Scotts and Cranberry Ponds at an elevation of 74.5 feet above sea level.

Mr. Singsen testified that in his opinion the statements of taking (Petitioner's Exhibit 2 [Lincoln] and Petitioner's Exhibit 6 [Cumberland]) contain neither a reservation nor a grant nor an exception authorizing or permitting Ronci, the petitioner, to operate the Ashton Dam so as to flow waters of the Blackstone River over and upon the area of the condemned land.

He further expressed his opinion that after the effective date of condemnation (August 21, 1963), Ronci, the petitioner, could not legally maintain the Ashton Dam and had, therefore, lost the right to operate the Ashton Dam so as to flow waters of the Blackstone River over and upon the area of the condemned land.

Mr. Singsen further expressed his opinion that Ronci, the petitioner, owned the Blackstone Canal, and that the

water rights, the riparian rights, and the flowage rights of petitioner, Ronci, were "rights in real property" within the language of the *General Laws of Rhode Island, 1956, 37-6-13* and *37-6-14,* and further that they were (and especially the flowage rights) "an interest, estate or right" condemned by the instruments of condemnation of Freeway Plat 1347.

He further rendered the opinion that to the extent that the Ashton Dam caused the water of the Blackstone River to flow back, and over, and upon the area of the condemned land (Petitioner's Exhibit 121, Area A, B, C, D), Ronci is a trespasser on that land and the trespass was caused not by any act of commission or omission by Ronci, but by the taking and condemnation of the land and the rights therein by the State of Rhode Island under the condemnation instruments, Freeway Plat 1347, dated August 21, 1963.

MR. ELLSWORTH V. STANLEY is a Civil Engineer and was President and Treasurer of Stanley Engineering, Inc. He supervised the work done by the employees of Stanley Engineering, Inc., in the Blackstone River at the Ashton Dam, with relation to the Blackstone Canal and the areas of Scotts Pond, Cranberry Pond, and Mill Pond in October 1967.

Mr. Stanley testified that his experience in the decade from 1960 to 1970 in working on the Blackstone River from the Ashton Dam north to Woonsocket reflected that there was no change in the normal flow of the river from August 21, 1963 to October 1, 1967.

In his field work, Mr. Stanley generated seven profile drawings (Petitioner's Exhibits 42A, 42B, 42C, 42D, 42E, 42F, 42G) of the area of condemnation. He testified

that the Ashton Dam in the Blackstone River, located 1,350 feet south of the southerly line taken (Petitioner's Exhibit 121, Areas A, B, C, D), diverted the water of the Blackstone River down through the Blackstone Canal and that in performing its function of diverting the waters of the Blackstone River, caused the waters of the Blackstone River to backflow for a distance of approximately 6,200 feet, and flow over the area of the condemned land at a depth of at least 6.5 feet at normal river flow.

He further testified that no tests were made regarding the existence of springs in Scotts Pond or in Cranberry Pond, and that the grade of the land on the westerly side of the Blackstone River where said Parcel 4 on Highway-Freeway Plat 1347 was located was a steep hill. He further agreed that his conclusions about the trespass by Ronci were based on the theory that the flowage rights of Ronci were extinguished by this condemnation, but admitted that there was no actual stopping of the above mentioned flowage rights of Ronci.

He said further, that he believed the trespass by Ronci could be removed by breaching the Ashton Dams.

MR. HOWARD M. TURNER is a Civil Engineer specializing in Hydraulic Engineering. He testified that he was familiar with the Highway-Freeway Plat 1347 (Petitioner's Exhibit 3, Lincoln; Petitioner's Exhibit 9, Cumberland), and that his purpose in having field work done by Stanley Engineering, Inc., was to determine the effect, from an engineering viewpoint, of the instant condemnation on the water system owned by the petitioner Ronci in the Blackstone River. He opined, as a hydraulic engineer, that by reason of the taking under the condemnation instruments under Highway-Freeway Plat 1347 and accompanying documents, Ronci lost its flowage rights over and upon the condemned land. He testified that the

function of the Ashton Dam, owned by petitioner Ronci, is to divert the water of the Blackstone River through the Blackstone Canal into Scotts Pond and Cranberry Pond.

He further testified that in his opinion when the waters of Scotts Pond were at elevation 74.5 feet above mean sea level, Scotts Pond would contain 319,000,000 gallons of water; and when the waters of Cranberry Pond were at elevation 74.5 feet, there would be 52,000,000 gallons of water in Cranberry Pond.

Mr. Turner expressed an opinion that the two Ashton Dams and the silt, the debris and accumulation between these two dams had to be completely removed in order to prevent the flowage of water of the Blackstone River over and upon the condemned land or any portion thereof.

This action he said would make it impossible to divert the waters of the Blackstone River into the Blackstone Canal, the principal supply of water to Scotts and Cranberry Ponds. The reason for this is that the elevation of the bed of the Blackstone River is 67 feet above sea level, whereas the elevation of the bed of the Blackstone Canal is 69 feet above sea level.

He testified that when operational, the Ashton Dam had a capacity to divert 33 million gallons of water per day into the Blackstone Canal, which in turn could deliver 32 million gallons of water per day into Scotts and Cranberry Ponds. He indicated that these figures were the "safe yield", the flow that could be counted upon at all times including periods of drought. He also testified that if the two Ashton Dams, along with silt and debris and the accumulation between them, were removed so that the waters of the Blackstone River would not flow through the Blackstone Canal except occasionally in flood stage, the

safe yield of the Blackstone Canal at its mouth or entrance would be zero.

MR. DANIEL P. FANNING is a Registered Professional Engineer and President and General Manager of C.F.I. Construction Company. He testified that the cost of removing both the old and the new Ashton Dams and the silt caused by them would be $36,409.00.

MR. PAUL W. CARTER, a Real Estate Appraiser, testified as to his real estate appraisal (Petitioner's Exhibit 66) taking Parcel 4 as a separate entity from Parcel 6. He stated that Parcel 4 was connected to a part of the industrial water supply system established by the operation of the Ashton Dam, the Blackstone Canal, Scotts and Cranberry Ponds, and accepted the theory that the right of petitioner Ronci to operate the Ashton Dam was extinguished because the State of Rhode Island took in fee simple and Ronci was trespassing on the land of the State in the area of the condemnation by backflowing water above the level of the natural flow of the Blackstone River in that area. He said that in his opinion the taking damaged Ronci in the amount of $441,000. He said Ronci was also damaged in the amount of $500.00 by the taking of the land designated as Parcel 6. He accepted the idea that Ronci had lost a valuable industrial water supply system which could and did provide 32 million gallons per day of water to Scotts and Cranberry Ponds.

Mr. Carter's evaluation considered the following operative facts:

(1) Sale of Omega Pond as set forth in the deed from Sayles Finishing Co. to Washburn Wire dated February 10, 1960 (Petitioner's Exhibit 67). This was a sale of one and one-third acres of land and a water

supply of 7 million gallons of water per day of which 3 million gallons per day were encumbered; the three encumbered are as follows:

1 mgd to Kennecott Wire – no charge
1 mgd to Washburn Wire – no charge
1 mgd to Bird at $30.00 per day
thus leaving 4 mgd unencumbered

(2) The indenture of lease from East Providence Water Co. to Charles Bird dated December 1907 (Petitioner's Exhibit 68) whereby Bird could use up to and no more than one mgd from Omega Pond at the rate of $30.00 per one mgd.

(3) The colored map in Petitioner's Exhibit 66 included the following:

(a) *Land covered by water:*

Scotts Pond	37.33	acres
Cranberry Pond	11.68	"
Mill Pond (so called)	3.53	"
Blackstone Canal	24.05	"
Total land covered by water	76.59	"
(b) *Land not covered by water:*	58.67	"
Grand total of both land covered and not covered by water	135.26	acres

Mr. Carter evaluated the before condemnation value of Parcel 4 under Highway-Freeway Plat 1347 as enhanced by Ronci's Complete Water System:

+125% (upward adjustment) for increased volume of water based on 12-1/2 mgd reasonable, foreseeable anticipated demand. Increase in volume was from 4 mgd

unencumbered in Omega Pond to 12-1/2 estimated in the subject property in the Blackstone River, and not 32 mgd because in his opinion 32 mgd was in excess of reasonable anticipated demand.

The upward adjustments range between 100% and 150% or an average of +125%. He arrived at this +125% average upward adjustment as follows:

It was anticipated that land as enhanced by water rights is not sold readily in the open market.

The unencumbered volume of the subject property is 12-1/2 mgd which is three times the 4 mgd unencumbered of the comparable Omega sale.

Carter incorporated a 15% upward adjustment for time factor because the condemnation under Freeway Plat 1347 was 3-1/2 years subsequent to the date of the sale of Omega Pond.

Carter further made a downward adjustment of 30% because of the annual income from the Bird deed (Petitioner's Exhibit 68) which provided for $30.00 for 1 mgd or $8,400. for each year prior to the Omega sale.

Carter in conclusion assigned a *before* value of Parcel 4 of $450,000. as enhanced by Ronci's water system.

Carter's computations for the *after* value of Parcel 4 were as follows:

–80% downward adjustment for decreased water volume

Carter arrived at this 80% downward adjustment by accepting the estimate of Howard M. Turner that the "safe yield" of Scotts Pond, after the removal of the two Ashton Dams, the silt, the debris, and the accumulation between

them, would range from zero to not in excess of 0.5 mgd. This 0.5 mgd compared to the 4 unencumbered mgd of Omega Pond is 1/8 of the volume of Omega Pond; therefore, there is a decrease of 80% for volume.

Carter introduced a 15% upward adjustment for time factor, because the condemnation under Highway-Freeway Plat 1347 was 3-1/2 years subsequent to the date of the sale of Omega Pond (Petitioner's Exhibit 67).

Carter made a downward adjustment of 30% because of the annual income from the Bird deed (Exhibit 68) which provided for $30.00 for 1 mgd or $8,400. for each year prior to the Omega sale.

Carter expressed the *after* value of Parcel 4 as $9,000.

The summary of Carter's evaluation of *Before and After Value* of Parcel 4 as enhanced by Ronci's water system:

Before Value	$450,000.
After Value	9,000.

reflected damages sustained by petitioner Ronci by reason of the destruction of Ronci's complete water system by the condemnation of Parcel 4 under Highway-Freeway Plat 1347 and accompanying documents – $441,000.

Carter further testified as to his evaluation of before and after value of Parcel 6 under Highway-Freeway Plat 1347:

He took into consideration the following data, all of which appear on Lincoln Assessor's Plat 30:

Lot 11	67.11	acres
Lot 17	17.22	"
	84.33	acres

Less 4 acres comprised of the following:

0.48 acres at north end of Lot 17		
3.52 acres at south end of Lot 17	4.00	acres (to which Carter attributed no value)
	80.33	acres x 2,000 per acre = $160,660 rounded to $160,000
Total before value		$160,000

Carter further testified as to his evaluation of *after* value of Parcel 6 under Highway-Freeway Plat 1347.

Carter took into consideration the following lots, all of which appear on Lincoln Assessor's Plat 30:

North and south portions of Lot 11	54.71	acres
North and south portions of Lot 17	11.37	"
	66.08	acres

66.08 acres x $2,000 per acre	$132,160
Center portion of Lot 11 – 12.4 acres	
12.4 acres at $2,200 per acre	27,280
	$159,440

North end and south end of Lot 17

0.48 acres at north end
3.52 acres at south end
4.00 acres – no value

Total after value (rounded) $159,500

A summary of Carter's evaluation of *Before and After Value* of Parcel 6 under Highway-Freeway Plat 1347:

Before value	$160,000
After value	159,500
Value of taking of Parcel 6	500

A summary of Carter's opinion as to damages sustained by Petitioner Ronci under Highway-Freeway Plat 1347:

Damages sustained by petitioner Ronci, by reason of the destruction of petitioner Ronci's water system by the condemnation of Parcel 4 under Highway-Freeway Plat 1347 and accompanying documents	$441,000
Damages for taking of Parcel 6	500
Total damages sustained by Ronci under condemnation instruments No. 1347	$441,500

MR. JOHN F. ROWLSON is an Appraiser and testified as to his written appraisal (Petitioner's Exhibit 91) of the before and after value under Highway-Freeway Plat 1347. He used three methods:

The first he called the theory of *substitution* under which he arrived at an opinion of value of $423,000.

The second method was *market data* based on the sale from Sayles Finishing Co., Inc. to Washburn Wire Co., February 10, 1960 of the land and water, (Petitioner's Exhibit 67) referred to in Mr. Carter's appraisal as the Omega Pond area (Petitioner's Exhibit 66) under which he arrived at an opinion of value of $417,000. He obtained his information from Mr. Carter about said sale.

The third method was capitalization based on an agreement between the East Providence Water Company and Charles S. Bird (Petitioner's Exhibit 68) dated December

18, 1907 calling for the payment of thirty ($30) dollars per mgd under which by capitalizing this figure applied to 12 million gallons, he arrived at a value of $407,000.

Of the three methods explored, he said in his opinion, the second method, market data, was the one he relied upon in arriving at the fair market value of the property, namely, $417,000.

He, too, adopted the petitioner's theory that because the State of Rhode Island took the fee, it extinguished the flowage rights of Ronci, necessary to the operation of the Ashton Dam as part of the Blackstor Canal Complex. He gave an after value of $22,500 which he deducted from the $417,000 figure, leaving $394,500 to which he added $36,409 as C.F.I. Construction Company's estimate of the cost of removing the dam and silt for a final opinion of total damage of $430,909. In connection with the actual land taken from tax assessor's Lots 17 and 18 on Plat 30, he placed a value of $500 per acre based on comparable sales. In substantiation of his opinions, he referred to several authors, one being a report of Metcalfe and Eddy, Engineers, to the Water Resources Coordinating Board (Respondent's Exhibit E), and also a report of Whitman and Howard, Inc., Engineers, to the Water Supply and Water Distribution System of the Town of Lincoln (Respondent's Exhibit F). He had no opinion of damages if the flowage rights of Ronci in the operation of the Ashton Dam were not extinguished.

RESPONDENT'S WITNESSES

LEWIS A. WATERMAN, *Esq.* has specialized in title work for many years in the State of Rhode Island and is presently Title Counsel of the Real Estate Title Insurance Company of Providence, Rhode Island. Mr. Waterman

testified that in his opinion the Mill Dam Act of the State of Rhode Island (Petitioner's Exhibit 109) controls in the present case. (*Title 46-18* and *Title 46-19, General Laws of Rhode Island, 1956,* as amended.) This Act, he said, gives the owners of dams properly erected a right in the nature of an easement to flow other land in the operation of said dam. In reference to the statutes which authorize condemnation for freeway purposes, including the taking away of "access", he noted that water flowage rights are not included. (*Title 24-10.* Petitioner's Exhibit 110.) The easement or right of flowage under the Mill Dam Act is appurtenant to the dam, he testified, and the only way the State could acquire the flowage rights appurtenant to the dam would be to take by condemnation the land on which the dam is located. He testified that since the only land taken by the State was about 1,300 feet north of the actual location of the Ashton Dam, the taking was subject to the flowage rights generated by the operation of the Ashton Dam in its connection with the Blackstone Canal Complex. It was his opinion that it was not necessary to have an exception, reservation or grant within the four corners of the description of taking relating to the flowage rights of Ronci in its operation of the Ashton Dam as the limitation or restriction relating to use of the land taken was by statute, namely the Mill Dam Act.

He distinguished between the situation where an individual by deed of conveyance conveys away rights and the situation where an official of the State files papers condemning property under the authority of condemnation statutes, and subject to other statutes then in full force and effect. He said the *Sullivan, Murphy* and *Honig* cases (Petitioner's Exhibits 106, 107 and 108) were cases involving loss of access under the above mentioned statutes authorizing condemnation for highway and freeway purposes and were not concerned with extinguished water rights authorized under another statute.

MR. DANIEL O. CARGILL was Chief Engineer, Department of Public Works, Division of Roads and Bridges, in the State of Rhode Island at the time of condemnation of Highway-Freeway Plat 1347, having retired in August, 1969, after 46 years of public service. He testified that he signed Highway-Freeway 1347 plat map and the descriptions of taking along with Angelo A. Marcello, then Director of Public Works in the State of Rhode Island. He described the properties taken in said condemnation and the twin viaduct structures used to cross the Blackstone River and carry the traffic of the freeway designated as Interstate Route 295 (I-295) across said river from east to west and west to east. He said that there were never any bridge construction plans that in any way interfered with the natural flow of the Blackstone River, or the back flowing of said river generated by the operation of the Ashton Dam.

He pointed out that the twin viaducts of Route I-295 were high elevation structures. He said that because of the provision of the statute requiring a hearing before and approval by the Public Utilities Commissioner when any condemnation of railroad land is intended, a practice was established that easements would be established so that the operations of the highway and the railroad would be in harmony with each other.

Where river crossings were involved he said that wherever the proposed crossing method or design would impose any constriction of or obstruction to free flow of the existing river at any flow stage, negotiations would be carried out with the Chief of the Division of Harbors and

Rivers and, if necessary, a public hearing would be held before any taking by condemnation would be effected.

Mr. Cargill testified that the State in its planning of the construction of the twin viaducts of Plat 1347 took into consideration the conditions that existed in the area of the take at the time of condemnation including the rights of upper and lower riparian owners of land, and particularly the back flowage of the waters of the Blackstone River generated by the operation of the Ashton Dam under the authority of the Mill Dam Act, *Title 46-18.* Since the condemnation was, under said statutes, subject to said flowage rights and there was no need for the State to interfere with said flowage rights in the construction of the high level twin viaducts, no negotiations were conducted with the Chief of the Division of Harbors and Rivers. He testified that there were 5 crossings of the Blackstone River from Woonsocket to Pawtucket, and in none of these crossings have the rights of upper or lower riparian owners been interfered with by the State.

MR. SAMUEL ENGDAHL was Supervising Civil Engineer, Bridge Design, Division of Roads and Bridges, Department of Public Works, at the time of condemnation. He testified that he worked under the said Daniel O. Cargill and directly supervised the design and planning of the high level twin viaducts.

He corroborated the testimony of Mr. Cargill about there being no idea of putting any structures in the area covered by the Blackstone River as it was back-flowed by the operation of the Ashton Dam. He further testified that the State took the land subject to the flowage rights of Ronci in its operation of the Ashton Dam and did not interfere with said rights in any way.

MR. HENRY ISE was Chief of the Division of Harbors and Rivers at the time of said condemnation, as well as at the time of testifying. He showed his familiarity with the history of the Ashton Dam and the laws of riparian rights. He said that the rights of Ronci to continue the operation of the Ashton Dam were not extinguished by the condemnation in Highway-Freeway Plat 1347. He said that the State took subject to many riparian rights and other drainage and flowage rights, including the flowage rights of Ronci in the operation of the Ashton Dam. The fact that the State took in fee simple for freeway and highway purposes did not alter his opinion which he said was based on the common law as well as the limitations in our freeway condemnation statutes. He referred to *Gould on Waters* and *Angell on Watercourses.* He said, in his opinion, it was not necessary for the State to spell out the riparian rights or rights of flowage set forth in the Mill Dam Act statutes of the State of Rhode Island in the description of taking to make the take subject to these limitations and restrictions. The Ashton Dam was lawfully there at the time of the condemnation and had the right to remain there as it has after the condemnation. He said that the laws of water were not involved in the *Sullivan* case; only the physical access as defined in the freeway statute was involved and therefore it was not in point as far as the present case is concerned.

MR. JOSHUA CHOPY is Principal Civil Engineer, Bridge Design Section, Department of Public Works. He was asked about the feasibility of pumping water from the Blackstone River into the Blackstone Canal so as to replace 12,500,000 gallons of water per day. He presented his study of the design of a pumping system from the Blackstone River into the Blackstone Canal (Respondent's Exhibit J). He concluded that such a pumping operation

would be economically feasible and practical from an engineering opinion, if the figures presented to the Court by the experts for the petitioner were correct. He said the pumping station would be located at the point where the Blackstone River waters are now diverted into the Blackstone Canal. He then described the essential elements of such a pumping station and their over-all costs. He concluded that this operation could produce water at $4 per million gallons and referred to the report of petitioner's expert, John F. Rowlson, at page 64 of his report (Petitioner's Exhibit 91). "The rate used in arriving at the opinion of value of this method was $30 per million gallons of unprocessed water. Therefore this method is considered conservative."

Therefore, Mr. Chopy concluded that if water could be sold for $30 per million gallons and only cost $4 per million gallons to supply, the operation would be economically feasible.

MR. HENRY F. MONROE is a Registered Professional Engineer in Rhode Island and Massachusetts, and was Staff Director of the Water Resources Coordinating Board of the State of Rhode Island.

Mr. Monroe testified in response to questions about the representations made in the report of petitioner's real estate expert, John F. Rowlson, at pages 41 through 44 wherein a great need for the water supply system referred to as the Blackstone Canal Complex was claimed. He said he knew of no such need. He was also directed to the report by Metcalfe & Eddy, Engineers, to the Water Resources Coordinating Board of the State of Rhode Island dated June 30, 1967 (Respondent's Exhibit E) and he stated that said report did not refer to or recommend

the Blackstone Canal Complex as a source of water supply.

MR. MORRIS CHORNEY is Executive Director of the State Department of Transportation and Chief Engineer of the Public Works Division, State of Rhode Island, formerly Director of Public Works. He identified Respondent's Exhibits A and AA for identification as certified copies of the Declaration of Clarification Re Intention of Taking executed by him in his said capacity on behalf of the State of Rhode Island, and having been duly recorded in both the Towns of Lincoln, Rhode Island, and Cumberland, Rhode Island. He said there was no action by the State Properties Committee re the execution and recording of said instruments other than its actions of August 15, 1963. He said such action was sufficient as there was no change with regard to what was taken, merely an instrument on the record clarifying the question of the taking as it related to the right of Ronci to operate the Ashton Dam after the condemnation.

He further testified that there were no reservations nor exceptions nor implied grants expressed in Petitioner's Exhibits 2 and 6, Statements of Taking, whereby Ronci retained its flowage rights via the Ashton Dam to flow water over the condemned land. He was familiar with the three steps necessary to effectuate a condemnation by the Department of Public Works under *General Laws of Rhode Island, 1956, 37-6, 1 through 25,* namely filing of a plat, a legal description, and a Statement of Taking. He further testified that title to Ronci's land was vested in the State of Rhode Island on August 21, 1963. He further admitted that if a fee simple were taken over the Providence-Worcester railroad property, the railroad could not cross the freeway line. He admitted that the State of Rhode Island could have taken an easement over parcels 3, 4, 5

and 6; and further testified that the State of Rhode Island could also have taken a fee simple subject to Ronci's right to flow water of the Blackstone River over the condemned land. He further agreed that under the Statements of Taking (Petitioner's Exhibits 2 [Lincoln] and 6 [Cumberland]) the piers and columns could have been placed anywhere in the area of the condemned land, Area A, B, C and D appearing as Petitioner's Exhibit 121, if the design called for it.

The Court inquired as to the uniqueness of the documents entitled "Declaration of Clarification Re Intention of Taking" (Respondent's Exhibits A and AA).

Mr. Chorney testified that for the past 35 years he has worked in the Department of Public Works, and has never previously seen and has never known of the existence of a document similar to the documents appearing in the case at bar as Respondent's Exhibits A and AA entitled "Declaration of Clarification Re Intention of Taking".

MR. WILLIAM H. SPAULDING, JR. is Superintendent, Water Department, in the Town of Lincoln, Rhode Island. Mr. Spaulding testified about his experience with the water supply problems of the Town of Lincoln and the report concerning the Water Supply and Water Distribution System of the Town of Lincoln by Whitman and Howard, Inc., Engineers, dated March 1967 (Respondent's Exhibit F). He said the report covered the estimated demands for water to the year 2025 A.D. The Moshassuck River was suggested as a future source of good water supply by said engineering report, whereas no reference at all was made to the waters of the Blackstone River or the Blackstone Canal Complex as possible sources of water supply for the Town of Lincoln. He said that the need expressed in the report of John F. Rowlson was non-existent in the Town of Lincoln especially as to

the type of water supply offered by the Blackstone Canal Complex. It was his personal opinion that before the Blackstone Canal Complex would become a source of water supply, the State of Rhode Island would become the over-all supplier of water for the whole State, including the Town of Lincoln.

MR. WILLIAM E. COYLE, JR. is a real estate appraiser. He testified for the State in two stages. First, he testified to his opinion of the damages sustained by Ronci because of the condemnation based on the legal conclusion that the rights of Ronci to operate the Ashton Dam were not extinguished by the condemnation. Later, he testified concerning the damages based on the legal conclusion that the rights of Ronci to operate the Ashton Dam were extinguished by the condemnation and Ronci therefore would not be able to supply the water from the Blackstone River into the Blackstone Canal Complex.

Mr. Coyle testified about the problem he had in 1964 when handling the sale of properties on the Blackstone River which included a dam with water rights. He said he had to remove the dam from the sale before the properties could be sold because no one wanted the dam or the water rights. In his first approach, Mr. Coyle used the Market Data Method relying upon comparable sales; his written appraisals were introduced as Respondent's Exhibits K-1 and K-2 for parcels #4 and #6 respectively on said Plat 1347. His opinion was that in appraising the damage caused by the taking of said parcel #4 from the area designated by Lincoln Tax Assessor as lot 18 on plat 30, the value of said lot 18 before condemnation was $1,780.00 and after the condemnation it had a value of $1,500.00. He therefore concluded that the damage sustained by Ronci in this instance was $300. With regard to parcel #6 which was taken from lot 17 on plat 30, it was his opinion that the

value of said lot 17 before the condemnation was $17,220.00 and after the condemnation it had a value of $13,130.00. He therefore concluded that the damage sustained by Ronci in this matter was $4,100.00 which, when added to the $300.00 damage, gave a total damage of $4,400.00.

In his second approach, Mr. Coyle considered all of the property owned by Ronci in the vicinity of the Blackstone Canal Complex. He said he considered this the proper approach when appraising the loss or damage occasioned by the condemnation of a dam or water rights. The purpose of this appraisal was to estimate the fair market value of real estate and rights owned by Ronci in certain parcels of land, waters and improvements thereon located in said area in the Towns of Lincoln and Cumberland. It represented the estimated value of said Ronci property immediately before and after the condemnation. He used the Market Data Approach in his appraisal since there were numerous sales near the subject area. Colored photographs were included in his appraisal as Respondent's Exhibit L, and he utilized a large composite of assessor's plat maps (Respondent's Exhibit N).

He said at page 88 of his report (Respondent's Exhibit L) that:

> "the water rights and flowage rights appurtenant to this ownership should be estimated in accordance with the degree to which these rights 'enhance' the value of the land owned or to the extent that there is a demand for the use of this water for industrial purposes consistent with normal consideration of the ecological consequences."

He found that none of the many buildings in this complex desire or need the water of the Blackstone Canal or

the ponds. He found the same to be true of the neighboring Sayles Finishing Company Complex. He related his personal experience with the development of the Second Pawtucket Industrial Park Complex in Lincoln in which no demands were made for large quantities of water. He pointed to the fact that the Corning Fiberglass Plant, formerly a co-user of the Ashton Dam on the easterly side of the Blackstone River, had closed in the spillway and built a warehouse and no longer used the river water for any industrial purpose. It was his opinion that as of the date of condemnation, there was no demand for industrial water of the type produced by the Blackstone Canal Complex anywhere near this area nor was there any such need or demand within the foreseeable future. His opinions of the fair market values of Ronci properties in the area are recapitulated at pages 93 and 94 of his report showing the total value before August 21, 1963 to be $155,700.00 less total damages of $4,400.00, leaving an after value of $151,300.00.

MR. MARCEL G. COURNOYER is a resident of Manville, Lincoln, Rhode Island, and was on the date of testifying an employee of the Water Department of the Town of Lincoln. Previously, he had been in the Real Estate business in Lincoln and Cumberland.

He testified that one of the conditions of a purchase of land and the Manville Dam by him from the Melbarry Corporation and the Cumberland Corporation, was that he keep up the dam even though the waters from the operation of the dam were no longer used by anyone.

The witness Cournoyer further testified that he was familiar with the dams located on the Blackstone River north of the Manville Mill and Dam. He testified that the following industries which were located on the Blackstone

River north of the Manville Mill and Manville Dam all used water from the Blackstone River for industrial processes. He admitted he did not know the quantity of water being used but that each one of the following companies used sustantial amounts of water of the Blackstone River for industrial processes:

1. Blackstone Dye Works, Inc.
2. M. Dursin & Co., manufacturing chemicals
3. Enterprise Dye Works, Inc.
4. Fairmount Dye Works, Inc.
5. French Worsted Co.
6. Florence Dye Works

PETITIONER'S REBUTTAL WITNESSES

ARCHIE SMITH, *Esq.* is a member of the Rhode Island Bar and testified that he drew up *Chapter 3105* of the *1953 Public Laws of the State of Rhode Island, and Chapter 3515* of the *1955 Public Laws of the State of Rhode Island,* when he was a member of the Attorney General's staff. He testified that although water rights were not specifically spelled out in *37-6.14,* the term "land or other real property" within the provision of *37-6.14* covers water rights, flowage rights, riparian rights, etc. The only restrictions upon the State's right to condemn land or other real property for highway and/or freeway purposes is (1) that it must be taken and condemned for "public purposes", and (2) just compensation for such condemnation must be made to the owner.

He further rendered an opinion that the *Freeway Act (24-10-1.17)* does not prevent the State from taking Ronci's land including its flowage rights, riparian rights, etc. in fee simple for freeway purposes; that the purpose of the said *Freeway Act* was to authorize the condemnation in fee simple of land and other property and divesting the

condemnee's easement of light, air, and access. If real property is taken in fee simple for freeway purposes, the State's Property Committee takes everything that there is to be taken.

He further rendered an opinion that Ronci lost its flowage rights under the instruments of condemnation under Freeway Plat 1347 and its accompanying documents, and that if Ronci kept flowing water over the area of the condemned land, Area A, B, C and D (Petitioner's Exhibit 121), Ronci would be trespassing on said State land.

MR. PAUL W. CARTER, who previously testified, was recalled by petitioner to testify about transactions between Sayles Finishing Company and the Town of Lincoln involving Bonney Pond and water rights in the Moshassuck River. Over objection by the State he testified about the appraisal presented to the Internal Revenue Service concerning the gift of said properties.

The foregoing testimony has been summarized with reference to the exhibits necessary to provide a framework for the Court against which it may engage in discussion as to the issues at hand. The issues presented were: (1) What was the nature of the taking? (2) Were the flowage rights of Ronci in its operation of the Ashton Dam extinguished? (3) What is the fair market value of the real estate taken under Highway-Freeway Plat 1347 and its accompanying documents? (4) What is just compensation?

To make a determination as to fair market value, the Court must determine what is the character of the real estate in the instant case. All of the exhibits of the petitioner and respondents, save those of comparable properties, along with the testimony of all the witnesses for the petitioner and respondent, as well as a view, orient the

Court to the physical aspects and legal characteristics of the real estate in the instant case.

Fair market value has been defined as follows:

> " '* * * the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied.' 4 Nichols, Eminent Domain (3d ed.) §12.2[1], p. 32. * * *"
>
> *Assembly of God Church of Pawtucket, R.I. v. Joseph M. Vallone, Director of Public Works,* 89 R.I. 1 at p. 9 (1959)

The petitioner contends that because the State of Rhode Island took his property in fee simple it took all rights and easements, including water flowage rights, that existed prior to the condemnation in the area condemned. It is urged by the petitioner that the answer to this question of fair market value must be premised upon the view that the petitioner's right to operate his completely integrated water system in the Blackstone Canal Complex was extinguished by this taking by condemnation for freeway purposes controlled by *Title 37, Chapter 6* and *Title 24-10* of the *General Laws of Rhode Island, 1956,* as amended. It is further urged by the petitioner that this completely integrated water system is a valuable and desirable adjunct to the real property owned by the petitioner in the area and therefore petitioner's damages are considerable.

To establish this premise, the petitioner relies upon that evidence which shows that the petitioner was the owner of a completely integrated water system appurtenant to the land in question which was a valuable source of industrial water as pictured in the exhibits and testimony on the day of condemnation, August 21, 1963. The background and

history of title to the land in Freeway Plat 1347, and physical descriptions of the operation of the completely integrated water system as it relates to the flowage of water of the Blackstone River backward over and upon the land that was actually condemned by the State of Rhode Island was developed in detail by the testimony and exhibits presented. Evidence was presented to sustain the petitioner's position that by reason of the condemnation of Freeway Plat 1347, the petitioner would be trespassing on State land if he operated his completely integrated water system with the resultant backflow of water over and upon the condemned land. The petitioner seeks to establish this premise in order to have damages assessed in connection with this condemnation to include not only the fair market value of the land taken, but also the value of the loss of the completely integrated water system by reason of the allegation that by continued operation of the water system, the petitioner would be a trespasser on the condemned land.

The respondent, State of Rhode Island, through its exhibits and testimony, urges upon the Court that the flowage rights of petitioner Ronci in its operation of the Ashton Dam were not extinguished by the condemnation, because the State took the land in question in fee simple *for freeway purposes,* within the definition of freeway as defined in *24-10-1, General Laws of Rhode Island, 1956,* as follows:

> "24-10-1. *Definition.* — A freeway is a way especially designed for through traffic over which abutters have no easement or right of light, air or access by reason of the fact that their property abuts upon such way."

And in *24-10-3, General Laws of Rhode Island, 1956,* the following is stated:

> "24-10-3. *Extinguishment of easements — Regulation of access.* — Where an existing highway has been designated as or included within a freeway by the said director, existing easements of access, light or air may be extinguished by purchase or by taking under eminent domain, in accordance with any existing method now exercised by said director in purchasing or taking land for highway purposes. Access to such freeway from any existing highway, road or street may be regulated and restricted by said director. Access to any such freeway from any new highway, road or street shall be subject to the consent and approval of said director."

It is the contention of the State that in this taking "for freeway purposes", since water rights are not referred to, the Director of Public Works took the subject property hereto referred to as Freeway Plat 1347 subject to the right of petitioner Ronci to operate the Ashton Dam in accordance with the statutes of the State of Rhode Island. The State offered Exhibits A and AA "Declaration of Clarification re Intention of Taking" to indicate that the land records contain a complete statement of the nature of the interest taken by the State in its original filing of Freeway Plat 1347 and the description of the taking therein.

The petitioner Ronci in contending that it had lost a very valuable industrial water supply system, offered the testimony of Paul W. Carter, real estate appraiser, who concluded that the damages to the real estate with its water rights, including severance damages, was $441,500.00.

Using the "market data approach", William E. Coyle,

Jr., the respondent's real estate appraiser, concluded that the damage sustained by Ronci in this matter was $4,400.00

Were the flowage rights of Ronci in its operation of the Ashton Dam extinguished by the condemnation? It has been stipulated that the Director of Public Works was authorized by the State Properties Committee to take by condemnation the land in question and did properly take by condemnation the land in question in fee simple *for freeway purposes.* The taking is controlled by *Title 37, Chapter 6* and *Title 24, Chapter 10* of the *General Laws of Rhode Island, 1956,* as amended.

A freeway is defined in *Title 24-10-1, General Laws of the State of Rhode Island, 1956,* as follows:

> "24-10-1. *Definition.*— A freeway is a way especially designed for through traffic over which abutters have no easement or right of light, air or access by reason of the fact that their property abuts upon such way."

Section 3 of Chapter 10, Title 24, supra, entitled "Extinguishment of easements — Regulation of access.", reads as follows:

> "24-10-3. *Extinguishment of easements — Regulation of access.* — Where an existing highway has been designated as or included within a freeway by the said director, existing easements of access, light or air may be extinguished by purchase or by taking under eminent domain, in accordance with any existing method now exercised by said director in purchasing or taking land for highway purposes. *Access* to such freeway from any existing highway, road or street may be regulated and restricted by said director. *Access* to any such freeway from any new highway, road or

street shall be subject to the consent and approval of said director." (Emphasis added)

At no place in the above provisions are water rights referred to. Loss of access appears to the Court to mean access from abutting property onto the land taken for freeway purposes "*from any existing highway, road or street*" and "*may be regulated and restricted by said director.*" "*Access to any such freeway from any new highway, road or street shall be subject to the consent and approval of said director.*"

Title 46, Chapter 18 of the *General Laws of the State of Rhode Island, 1956,* entitled "Damages from Milldams" and *Title 46, Chapter 19* of the *General Laws* entitled "Inspection of Dams and Reservoirs" are the Rhode Island statutes which govern the construction, continuance, improvement or substantial alteration of water mills or dams. *Title 46, Chapter* 18 is commonly referred to as The Mill Dam Act.

Title 46, Chapter 18, Section 1, supra, reads as follows:

"46-18-1. *Right of owner to continue and improve dam and pond.* Whenever any person, either upon his own land or upon the land of another with his consent, shall have set up any water mill or dam for the purpose of forming a pond to supply water to any mill or mills upon the stream whereupon the dam is located, the owner of such mill or dam may continue and improve the pond *and keep up the dam thereof on his own land for his advantage without molestations.*" (Emphasis added)

Title 46, Chapter 18, Section 2, supra, reads as follows:

"46-18-2. *Action for damages from dam — Liability of mill and dam for recovery.* Any person aggrieved or injured by the flowing of the pond raised by such dam, or by the stopping or raising of the water either above or below said dam, or by the backing of water under his land, or by the flowing out of any fall of water in his land by means of such dam, may commence an action of the case in the superior court for the county in which such dam is, against the owner of the dam or any precedent owner thereof, and a copy of the writ shall be left by the officer serving the same in the office of the town clerk of the town in which such dam is; and the mill and milldam complained of, together with all their appurtenances and the land under and adjoining the same, shall thenceforth be pledged and liable for the damages which may be recovered in such action."

In the case of *Bull v. Valley Falls Co.,* 8 R.I. 42, (1864) the court said that the remedy for injury given under this chapter was exclusive so that a court of equity could not enjoin owners of a mill from so raising their dam as to flow back the water upon the land of another.

The other sections of *Title 46-18* provide for the procedures for establishing damages and the extent thereof. Nothing in the statutes indicate limits or changes in the rights of the owner of the dam.

It is the general rule, well recognized by our courts in condemnation proceedings, that only such an estate in the property sought to be acquired by eminent domain may be taken as is reasonably necessary for the accomplishment of the purpose in aid of which the proceeding is brought.

3 Nichols on Eminent Domain
(3d ed.) 262 §9.2

It is another principle well recognized in our jurisprudence that when an official of State government

acts he acts within the limits of his authority and with the interests of all of the people of the State in mind. In short, he acts in the best interests of the State and the people of the State irrespective of the technicalities involved.

3 Nichols on Eminent Domain
(3d ed.) 273 §9.2(2).

U.S. v. Certain Lands in Town of Jamestown, R.I.,
112 F. 622.

It is also recognized by our courts that when a condemnation is commenced in a manner that is not clear it may be clarified by subsequent publication or action provided that such subsequent action is not a limitation of the original condemnation.

United States of America v. Samuel S. Holmes and Eleanor Holmes, 238 F.2d 229 (C.A. 4 1956).

In the *Holmes* case there was a proceeding by the United States to condemn flowage easements in connection with a flood control project. A judgment was rendered for the landowners. The United States appealed and the landowners cross-appealed. The Court of Appeals held that judgment providing that landowners should not be foreclosed from asserting claims for damages that might result to them if there was greater flooding of their tracts by reason of failure to comply with specific schedule of water release set forth in the judgment, was too rigid and unduly limited the operation of the dam and would be modified to provide that if as the result of future changes in the structure or operation of the dam there should be greater flooding of a tract involved than was caused by the present structure and operation, owners would not be precluded by the judgment from recovering damages on account of such increased flooding.

The court said at page 230:

> "* * * Upon the remand the trial judge permitted the declaration of taking to be amended so as to describe more clearly the nature of the flowage easement which was being taken and which was in accord with the description thereof set forth in the original declaration of taking when read in the light of the report of the district engineer calling for a power pool elevation of 300 feet."

The court went on to say:

> "* * * We do not think that any amendment of the declaration of taking was necessary, but it did serve to make more definite and certain, and a matter of record, that the flowage easement which the government was taking was such as arose from flood waters which caused the level of the power pool to rise above a maximum elevation of 300 feet. The effect of this was not to acquire a lesser estate than that acquired by the original declaration, but to make more definite what was being acquired, so that the rights of landowners would be protected in case of future changes in the elevation of the pool or operation of the dam."

It is the conviction of the Court that when the Director of Public Works filed Highway-Freeway Plat 1347 and the description of taking in the Towns of Lincoln and Cumberland the subject land was taken in fee simple for freeway purposes. The Court also is convinced that the land was taken subject to the natural flow of the Blackstone River. The Director of Public Works did not have the power to interfere with the natural flowage of the Blackstone River. It has been stipulated to by the parties that at the time of condemnation Ronci was the owner of the Ashton Dam and had the right to operate said dam so as to cause water to be diverted into the Blackstone Canal

and from said canal into Scotts Pond and Cranberry Pond and cause the elevation of the water level of said ponds to be 74.5 feet above sea level. Testimony has been presented that to do so the elevation of the water at the Ashton Dam must be raised to 74.5 feet above sea level and that this caused the water of the Blackstone River in the area of the land taken to be raised to 74.5 feet above sea level.

At the time of the above mentioned taking the Ashton Dam was in operation as aforesaid under the authority of the statutes of the State of Rhode Island (*Title 46-18,* supra) which fact was known to the Director of Public Works. The taking was for the purpose of constructing bridges across said river without interfering with the Blackstone River *as it then existed. As it then existed* the Blackstone River was enlarged by the backflow caused by the operation of the Ashton Dam so that the elevation of the Blackstone River in the area of the take was 74.5 feet above sea level. There was also testimony that in flood waters in the area of the take the elevation of the Blackstone River went to elevations in excess of 80 feet above sea level.

From the evidence it appears to the Court that the Director of Public Works was aware of the restrictions on his authority to take the condemned properties subject to the existing situations, to wit: the natural flowage of the Blackstone River, the flowage caused by flooding in the area of the take and the flowage caused by the operation of the back flowage at the Ashton Dam. The credible evidence establishes the fact that no plans were prepared or submitted for the construction of any structure in the areas flowed as above mentioned, including the area back flowed by the operation of the Ashton Dam. Moreover, there is on record in the Towns of Cumberland and Lincoln, instruments entitled, "Declaration of Clarification

Re Intention of Taking," which clear up any question about the taking being subject to the flowage rights of Ronci in its operation of the Ashton Dam. These declarations are not a reduction of the interest taken. This is a clarification which serves to make more definite and certain, and a matter of record, that the taking was subject to the flowage rights of Ronci.

United States of America v. Samuel S. Holmes and Eleanor Holmes, supra.

The *Sullivan, Murphy* and *Honig* cases do not apply to the present case.

Sullivan v. Director of Public Works
100 R.I. 241; 214 A.2d 181 (1965)

Murphy v. Director of Public Works
103 R.I. 451; 238 A.2d 621 (1968)

Honig v. Director of Public Works
258 A.2d 73; R.I. (1969)

In those cases the question was whether the "access" of the condemnee had been cut off by the condemnation for highway or freeway purposes. The authority given the director to limit access is described by the provision of *Title 24-10-3,* supra.

It is true that in the taking in the present case as in the *Sullivan, Murphy,* and *Honig* cases, supra, the "access" of the condemnee *as defined in the statute, Title 24-10-3,* could be regulated and restricted by said director, but that is not the question before the Court. The question here is whether the director had the power and authority in this particular taking to extinguish the back flowage rights of Ronci required in the operation of the Ashton Dam. The Court concludes that he did not.

While in the *Sullivan, Murphy* and *Honig* cases, supra, there was no other statute to be considered in the instant case there is another statute, to wit: the statute entitled, "Damage from Milldams", *Title 46-18,* and the statute entitled "Inspection of Dams and Reservoirs", *Title 46-19.*

The court in *Sullivan v. Director of Public Works,* supra, said at page 186 of 214 A.2d:

> "* * * it is within their four corners, and only there, that we can ascertain what was acquired and *other than as provided by statute* what, if any, limitations or restrictions on the use thereof were assumed." (Emphasis added)

The concern here is not with any agreements outside the four corners of the written instrument filed as the description of the land or other real property taken. The concern here is not with any maps purporting to distinguish between the land taken for freeway purposes from that taken for highway purposes. The concern here is with the statutes establishing the rights of the owner of a dam to back flow water in the proper operation of said dam which limit the power of the Director of Public Works and cause his taking to be subject to the right of Ronci to back flow water in his operation of the Ashton Dam, "* * * for his advantage without molestations." *Title 46-18-1,* supra.

> *Manitowoc Clay Product Co. v. Manitowoc Green Bay & N.W. Ry. Co.,* 135 Wis. 94; 115 N.W. 390 (1908)

In the *Manitowoc* case, supra, the Wisconsin court held that a condemnee had to accept the offer of the condemnor to erect a crossing or subway which would give the condemnee access to its property and thereby lessen the damage sustained by said condemnee. The court said at page 392:

> "* * * Counsel for defendant assert that the plaintiff was lawfully entitled to a crossing, and that, as in all condemnation proceedings, the award of damages must be made in view of the legal situation."

The court went on at page 394 and quoted from the case of *Caldron v. C., St.P., M.& O.R. Co.,* 85 Wis. 527, 55 N.W. 955 as follows:

> "* * * The learned circuit judge there says: 'I cannot believe that the law of this state is such as to compel defendant to destroy and to make compensation for plaintiff's property rights in the land not taken, when defendant seeks to preserve the same uninjured, and will be able to do so by constructing the proposed undercrossing or subway at a comparatively small expense. If the law does that, then its effect is to force defendant, against its protest, to work a great and wholly unnecessary destruction of property value, which defendant offers to preserve, and is able to do so. The needless destruction of the value of property cannot be a result which the law sanctions or will seek to bring about'."

It is the conviction of the Court that the Ashton Dam was lawfully there in the Blackstone River under the provisions of the Mill Dam Act, so called. This was the legal situation. The State did not compel the removal of said dam by the qualified fee it took for freeway purposes. The Mill Dam Act still exists and nothing in the highway and freeway statutes appear to the Court to have repealed that act.

The fact that a dam owner cannot be prevented from removing a dam is not the question in the present case. There is no evidence that the State of Rhode Island through the Director of Public Works is trying to prevent the removal of the Ashton Dam. Consequently, the

following cases cited by the attorney for Ronci in oral argument appear to have no application to the instant case:

William E. Powers, Atty. Gen. v. Edward G. Lawson, et al, 86 R.I. 441; 136 A.2d 613 (1957)

Hood, et al v. Slefkin
88 R.I. 178; 143 A.2d 683 (1958)

Bristol County Water Company v. Peter Oliviera, et al., 87 R.I. 356; 141 A.2d 443 (1958)

After examining the cases cited and weighing all of the evidence, whether adduced by the petitioner or the respondent, which the Court considers credible, convincing and probative, the Court finds as a fact that the State of Rhode Island did take by condemnation the land in question in fee simple for freeway purposes subject to the right of petitioner Ronci to operate the Ashton Dam in accordance with the statutes of the State of Rhode Island.

What then is the measure of damages? Our Court has said that "just compensation" is the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have been if his property had not been taken. The general rule is that the measure of damages to be awarded as compensation for property taken in eminent domain proceedings is the fair market value of the property. The fair market value has been defined as the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell the property, taking into consideration all the uses to which the land was adapted or might in reason be applied.

Hale v. City of Providence
45 R.I. 167; 121 A. 66 (1923)

Robert Lataille et ux v. The Housing Authority of the City of Woonsocket
R.I. (1971) 280 A.2d 98

The Court having determined that the flowage rights of Ronci in its operation of the Ashton Dam were not extinguished, the testimony of Mr. Carter and Mr. Rowlson has been thoroughly examined and it is the conclusion of the Court that the only credible appraisal presented under this theory of the case was that made by William E. Coyle, Jr. His appraisals were also presented in written form in State's Exhibits K-1 for Plat 1345, Parcel 4 and K-2 for Plat 1347, Parcel 6. His method of appraisal was based on the Market Data approach, the same as that used by the petitioner's local expert appraiser for Parcel 6. He made proper allowance for landlock and severance and actually gave higher value to the land than the local expert of the petitioner.

In reaching this conclusion concerning Mr. Coyle's testimony the Court has thoroughly examined all the testimony and exhibits presented particularly that evidence presented by the petitioner, Ronci, concerning the Blackstone Canal Water Supply Complex. The petitioner attempted to appraise the alleged damage sustained by Ronci by putting a value on the water it claimed to be taken from Ronci by the extinguishing of the flowage right of Ronci in the operation of the Ashton Dam. Even under the petitioner's theory of the case that the rights were extinguished, which the Court has rejected, the method of appraisal used by the petitioner's expert appraisers is not the proper method of appraisal. Where the waters of a river, canal or pond are taken for a public use, the measure of damages is not the value of the water taken from the river, canal or pond, but the decrease in the

market value of the riparian land by reason of the diversion of the water.

Miller v. Windsor Water Co.
148 Pa. 429; 28 A. 1132 (1892)

Lewis v. The Springfield Water Co.
176 Pa. 237, 35 A. 187 (1896)

Evans v. Wheeler
209 Tenn. 40; 348 S.W. 2d 500 (1961)

Dugan v. Rank
372 U.S. 609; 10 L.ed 15; 83 S.Ct. 999 (1963)

In the *Lewis* case, supra, the court said at page 188:

"* * * On the other hand, the learned judge instructed the jury to ascertain the difference in value of the plaintiff's property, considering it first as it was before the appropriation of the water by the defendant, and then considering it as it was affected by that appropriation. This is the true rule to apply. It fixes the loss of the party affected by the exercise of the right of eminent domain, and for that reason correctly measures the damages to which he is entitled."

Also, a basic premise of the opinions of the petitioner's real estate experts was that there was a need for the type of water supply system which they referred to as the Blackstone Canal Complex. The Court does not accept this premise, hence the Court has considered only that evidence and the testimony of Mr. Carter which related to the damage caused by the condemnation of Parcel 6.

The testimony of the respondent, State's witnesses Henry F. Monroe, William H. Spaulding, Jr. and William E. Coyle, Jr. along with the engineering reports of Metcalfe and Eddy to the State Water Resources Coordinating Board (State's Exhibit E) and Whitman and Howard Inc.

to the Water Supply and Water Distribution System of the Town of Lincoln (State's Exhibit F) convinces the Court that there was no need or marketability at the time of the condemnation or within the foreseeable future for the water. Upon such a view of the evidence, where the Court is convinced that the basis for an opinion is not tenable or reliable, the Court may reject such an opinion and in the instant case the Court does reject the opinion of the petitioner's experts in this regard.

L'Etoile v. Director of Public Works
89 R.I. 394; 153 A.2d 173 (1959)

Such findings of fact and law as are material to the case have been set out by the court in this opinion.

Spangler v. Schaus
264 A.2d 161 (1970)

The Court considers Mr. Coyle is well-qualified as an expert real estate appraiser in the Rhode Island area and gives both of his opinions great weight as proper appraisals. As hereinabove stated, the Court adopts the theory presented by the State, namely, that the rights of petitioner to operate the Ashton Dam were not extinguished by the condemnation and accepts unqualifiedly Mr. Coyle's opinion of damages of $300.00 for Parcel 4 and $4,100.00 for Parcel 6, a total of $4,400.00 as set forth in State's Exhibits K-1 and K-2 by Mr. Coyle, to be the full and fair market value of the damages sustained by petitioner because of said condemnation.

Burden v. The Tax Assessor of the City of Newport,
47 R.I. 473 (1926)

The Court, having heard this matter at length, read all the cited cases, examined the exhibits and weighed the evidence feels constrained to respond to the query as to

what would the measure of damages be if the Court conceived this condemnation as having extinguished the rights of flowage of Ronci in its operation of the Ashton Dam. The Court would have accepted the testimony of Mr. Daniel P. Fanning (Exhibit 64) and found the cost of removal of the Ashton Dams, old and new, and the silt caused by them, at the cost of $31,178.00. The Court would, upon this theory of the case, accept the method of appraisal used by Mr. William E. Coyle, Jr. (Exhibit L) as the proper approach under this theory and hence treat it as the only convincing, credible and probative evidence before the Court as to the damages sustained by the petitioner. Why? Because upon a view of all the evidence which the Court considers credible, convincing or probative the Court is convinced that the petitioner, Ronci, has not proved that the petitioner's flowage rights and integrated water system, so called, were marketable or that they were valuable at the date of condemnation or within the foreseeable future.

The Court awards damages to the petitioner in the amount of $4,400.00 such plus interest as in law provided. Interest may be computed by counsel and so provided in the order presented in accordance with this determination of damages.

APPENDIX D

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

[1972 Feb 8 AM 10:12]

Bk 7
Judg 140

RONCI MFG. CO., INC.	)	
	)	
vs.	)	M.P. No. 6553
	)	
STATE OF RHODE ISLAND and DIRECTOR OF PUBLIC WORKS OF THE STATE OF RHODE ISLAND	)	

JUDGMENT

This action came on to be heard before the Court, Mrs. Justice Murray presiding, upon the prayers of the Petitioner for an Assessment of Damages in the above-entitled matter, and after hearing thereon

IT IS ORDERED AND ADJUDGED

That the Petitioner be awarded the sum of Four Thousand Four Hundred ($4,400.00) Dollars, plus interest of One Thousand Nine Hundred Thirty-Six and 91/100 ($1,936.91) Dollars, computed to January 21, 1972, or a total of Six Thousand Three Hundred Thirty-Six and 91/100 ($6,336.91) Dollars, and costs.

ENTERED as the Judgment of this Honorable Court this day of February, A.D. 1972.

By Order
/s/ Francis X. Kennedy
Ass't Clerk

ENTER:
Florence K. Murray J
Justice
February 8th, 1972

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment

The Fifth Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment (see *Penn Central Transp. Co.* v. *New York City,* 438 U.S. 104, 122 (1978)), provides, in part:

> . . . ; nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in part:

> . . . ; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Section 24-10-3 of Rhode Island General Laws (Freeway Eminent Domain)

24-10-3. Extinguishment of easements — Regulation of access.— Where an existing highway has been designated as or included within a freeway by the said director, existing easements of access, light or air may be extinguished by purchase or by taking under eminent domain, in accordance with any existing method now exercised by said director in purchasing or taking land for highway purposes. Access to such freeway from any existing highway, road or street may be regulated and restricted by said director. Access to any such freeway from any new highway, road or street shall be subject to the consent and approval of said director.

Section 37-6-5 of Rhode Island General Laws (Acquisition of Property For Public Use)

37-6-5. Power of department and agency heads to acquire property for public use.— Whenever in the opinion of the head of any department, board, bureau, commission or agency of the state government, hereinafter referred to as the acquiring authority, the acquisition of land or other real property or any interest, estate or right therein is necessary or advantageous to the establishment, acquisition, construction, development, betterment or maintenance of any governmental facility, public work or public improvement, such acquiring authority shall be and hereby is authorized and empowered, within the limits of the appropriations that are available or that shall be made available, with the approval of the state properties committee, and in the case of purchases by or gifts or devises to the state subject to the approval of the governor, to take in fee simple or otherwise in the name and for the benefit of the state of Rhode Island, by purchase, lease, gift or devise lands and other real property and rights, interests, estates, easements and privileges therein, and foreshore, riparian and littoral rights thereto for the public use within the state of Rhode Island.

Section 46-18-1 and 46-18-2 of Rhode Island General Laws (from The Milldam Act)

46-18-1. Right of owner to continue and improve dam and pond.— Whenever any person, either upon his own land or upon the land of another with his consent, shall have set up any water mill or dam for the purpose of forming a pond to supply water to any mill or mills upon the stream whereon the dam is located, the owner of such mill or dam may continue and improve the pond and keep up

the dam thereof on his own land for his advantage without molestations.

46-18-2. Action for damages from dam— Liability of mill and dam for recovery.— Any person aggrieved or injured by the following of the pond raised by such dam, or by the stopping or raising of the water either above or below said dam, or by the backing of water under his land, or by the flowing out of any fall of water in his land by means of such dam, may commence a civil action in the superior court for the county in which such dam is, against the owner of the dam or any precedent owner thereof, and a copy of the complaint shall be left by the officer serving the same in the office of the town clerk of the town in which such dam is; and the mill and milldam complained of, together with all their appurtenances and the land under and adjoining the same, shall thenceforth be pledged and liable for the damages which may be recovered in such action.